IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 3

A. M. ANDERSON, Receiver of the National Bank of Kentucky of Louisville, *Petitioner*,

v.

KATHERINE KIRKPATRICK ABBOTT, Administrator, et al., *Respondents*.

PETITIONER'S REPLY TO SUPPLEMENTAL BRIEF FILED ON BEHALF OF RESPONDENTS.

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PETITIONER'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF.

The excuse given by respondents for the recent filing of a supplemental brief is that the petitioner did not file his reply brief until the day of the previous argument on February 8, 1943; and that consequently they did not have an opportunity to respond. Respondents' original brief was not filed until February 1, 1943; Cross-Appellants brief was filed February 3, 1943, so that our printed reply thereto, filed five days later, was both prompt and timely.

Respondents state (p. 1) that the "ultimate question" presented here is whether or not "the ends of justice require" that the "corporate personality" of Banco "be ignored." This is not a fair statement of the question presented to this court. The question presented, as stated in

our petition for certiorari (p. 9) and re-stated in our original brief (p. 5) is as follows:

> "Are the owners of an insolvent National Bank relieved from individual liability or 'double assessment' under the applicable Federal statute, because shortly before the bank's failure, they organized a holding company and exchanged their bank shares for holding company shares?"

No claim has ever been made by the respondents until now that the question so presented was not fairly stated. Respondents, even now, do not challenge a single fact in our statement of the facts of the case as set forth in our original brief (pp. 7-37). Nor do they challenge any of the additional facts of the case set forth in our reply brief.

Beginning on page 2 of the supplemental brief respondents erroneously assert that the long list of cases cited in our previous briefs, holding that the "real" stockholder of an insolvent bank is liable for the assessment without regard to whether or not he is the "record" holder, were "decided subsequent to 1931" to clear away the wreckage left by the financial storm of 1929, 1935. This assertion is absolutely incorrect. The principle was first announced shortly after the National Banking Act was adopted in *National Bank* v. *Case* (1878), 99 U. S. 628. The subsequent decisions are set forth fully in our original brief beginning on page 40 and again referred to in our reply brief beginning page 27.

Respondents, in an effort to narrow the principle laid down in the cases referred to, admit that they would be liable

> "where the stockholders of a failing institution have attempted to use the corporate device to evade threatened liability, and where the corporation so used has no other substantial assets than the assets transferred to it and no other function than to act as a receptacle for those shares."

If we were to accept respondents own restricted rule they would still be liable in this case. The National Bank of

Kentucky was undoubtedly in a failing condition. We have set forth in great detail in our original brief, pages 7-29 the condition of this bank showing step by step its progress towards insolvency. The facts stated therein are taken directly from the written records of the bank reproduced in the record of this case. These facts as set forth therein have never been challenged by the respondents in any brief filed before this court.

There is no question but that these respondents organized Banco Kentucky. They tried "to evade threatened liability" by writing into Banco's articles of incorporation that its stock would not be assessable and by printing on the stock certificates "fully paid and nonassessable." Banco had "no other substantial assets" than the bank's shares and it transacted no business except "to act as a receptacle for those shares." This is pointed out in detail in our original brief, (pp. 27-33). It is submitted that respondents are liable in this case even under the narrow rule as stated by them in their supplemental brief.

However, the rule is far broader. The Federal decisions uniformly hold that the shareholders of bank stock holding companies are the real true and beneficial owners of bank stock and as such are liable for assessment although the banks prior to failure were considered sound and there was no intent to escape assessment. Nor is there any necessity to disregard the corporate entity where, as here, the corporation is created by the Bank's shareholders as their corporate agency or instrumentality.

At page 6 of the supplemental brief it is urged that respondents are not liable unless it was shown that Banco "was organized for the purpose of evading the statutory liability." We have never claimed that the only purpose for which Banco was organized was to escape the National bank stock assessment. The facts on this point are set forth in our original brief beginning at the bottom of page 26 where statements taken from the officers of the bank in letters written prior to the organization of Banco plainly indicate that one of the things contemplated was to escape double liability.

However, liability depends on statute—not intent—it is immaterial whether there was an honorable intent to pay or a dishonorable attempt to avoid assessment.

At page 49 of our original brief, and again at page 18 of our reply brief, we called this Court's attention to the case of *Deming* v. *Schram*, 7 F. Supp. 271, a companion case to the *Barbour* v. *Thomas case*, 86 F. (2d) 510, and stated that $7,500,000 of new money was put into the holding company in that case, but that it did not protect the holding company stockholders from the bank assessment. At page 4 of respondents' supplemental brief it is admitted that the $7,500,000 was paid into the bank stock holding company, but respondents assert that it was paid into a different holding company. The facts as to that situation are quite clear. The Guardian Detroit Union Group, Inc., which was the holding company in the *Deming* v. *Schram* case, was a successor in title through merger of two other bank stock holding companies, Union Commerce Corporation and Guardian Detroit Group. Guardian Detroit Union Group, Inc. was a consolidation of the two prior bank stock holding companies and the $7,500,000 was paid into the Union Commerce Corporation shortly before its consolidation into Guardian Detroit Union Group, Inc.

In the supplemental brief, recently filed, it is again urged (p. 6, 7) that because the petitioner first proceeded against BancoKentucky, he is in some manner now precluded from proceeding against the stockholders of BancoKentucky. An isolated quotation is printed (p. 6) from the District Court's opinion and another isolated quotation (p. 7) is taken from the Court of Appeals decision. Under the heading "NO DEFENSE CAN BE BASED ON PRIOR CASES", we have covered this matter fully, on pages 20 and 21 of our reply brief. We have also reviewed these prior cases in detail under the heading "*LAURENT* v. *ANDERSON*, 70 F. (2d) 819", beginning on page 22 of our reply brief. The prior suit in the District Court was known as *Keyes* v. *American Life & Accident Co.*, and in the Circuit Court of Appeals as *Laurent* v. *Anderson*.

In the supplemental brief, beginning on page 8, it is for the first time claimed that certain "findings of fact" of the District Court stand as a bar to a reversal of this case. In order to meet this assertion, we want to call the Court's attention first to the fact that substantially the whole record of this case is documentary; documents, books, letters and other papers taken from the records of the bank. We want also to call the Court's attention to the fact that, prior to the trial and pursuant to Rule 36, these documents were presented to counsel for respondents, with a request that they admit the genuineness of the same, and that, after due consideration, respondents admitted the genuineness of said documents and stipulated certain facts to be true (R. 2, pp. 74-116). Therefore, substantially all the facts in this case appear in accredited documents or in stipulation of facts, about which there is no dispute. It is because of this that respondents have not, to this date, challenged a single fact set forth in either our original or supplemental brief. Therefore, without challenging any of these facts, they now say that this Court cannot look at these undisputed documentary facts, because of certain findings of the District Court.

The findings of the District Court referred to are copied on page 8 of respondents' supplemental brief.

We invite the Court to examine these so-called findings of fact. We submit that they are, in reality, not findings of fact, but were conclusions of law. So-called findings of fact 64, and 65, also appear as number 7 in the conclusions of law. Finding number 66 is copied verbatim as conclusion of law number 8. Respondents must necessarily concede that this Court may review conclusions of law number 7 and number 8. Therefore, if this Court should consider that conclusions of law numbers 7 and 8 are erroneous, it would be rather strange to say that this Court would be barred in ordering a reversal simply because the erroneous conclusions of law were also copied verbatim as findings of fact.

'So-called finding of fact number 19 states that Banco was established for its "avowed purposes". What its "avowed purposes" were is not stated by the Court but it was a congenital condition "avowed" in the prospectus that it hold the stocks of the National Bank of Kentucky and Louisville Trust Co., and its officers and director "avowed" that its primary purpose was to hold back stocks (See our main brief pp. 32-43). The finding also states that there was no "thought on the part of any of its organizers of avoiding double liability". It is difficult to tell who the Court had in mind in this finding when it used the word "organizers". The written records plainly show that somebody had a "thought" about double liability when they "distinctly provided" in the Banco's charter and on its certificates of stock that it was "nonassessable". The President of Louisville Trust Company "thought" about double liability when he wrote to the President of National Bank of Kentucky immediately prior to the organization of Banco and stated: "One of the advantages of transferring your bank stock for BancoKentucky Company stock is that you are relieved of the double liability clause" (Ex. V 3, pp. 1262, 1264). And the President of National Bank of Kentucky must have had some "thought" about the matter when he read the letter. Hayes, the Vice President of the National Bank of Kentucky, had some "thought" on the subject when he said: "The new stock will be in just as safe a position, as I see it, as the old, and without double liability". (Ex. V 3, p. 1398).

It is submitted that what the District Court had in mind, in finding number 19, was that the stockholders of the bank, at the time they organized Banco, did not think that the bank was going to fail. They "thought" that the new money going into Banco would be used, to clear the deadwood out of the National Bank of Kentucky. However, instead of doing what they promised the bank examiner they would do, they immediately proceeded to invest the new money in a lot of other assessable bank stock: neither reserving funds with which to pay assessments or cleaning

the deadwood out of the National Bank of Kentucky. But prior to the receipt of any money, it had contracted to spend over $7,600,000 for other assessable bank stock (R. 2, p. 280) and, subsequently it invested substantially all of this new money in assessable bank stock. It must not be forgotten that the whole thing collapsed, the banks as well as Banco, in just about one year. If the officers, directors and stockholders of the bank, who were the organizers of Banco, did not know of the precarious condition of the bank, it was their duty to have known it. They have no right to assert their own neglect as a defense to this law suit, brought for the benefit of the depositors of the bank.

So-called findings of fact numbers 61, 62, and 63 certainly do not prevent this court from reversing this case. We hardly know what is meant by finding number 61 that "Banco was organized in good faith". There is no dispute but that it was a legally organized corporation under the laws of Delaware. We do not quarrel with finding number 62 that it was "not a sham". These are nothing but general conclusions anyway, and we cannot tell what basic facts the court had in mind in making such findings. The same observation applies to finding number 63.

So-called findings numbered 64, 65 and 66, as we have previously stated, are nothing but conclusions of law and in identical language, appear as conclusions of law in Conclusions of Law numbered 7 and 8.

The supplemental brief attempts, beginning at page 11 under the caption "Banco's Origin and History" to make a partial statement of the facts of this case. In this so-called history of Banco, they have taken an isolated fact here and there, from the record, without attempting to give the court a full and complete statement of all the facts, and without in any way challenging any fact we have set forth in any of the briefs we have filed. It is not quite fair to ask this court to judge this case on some of the facts. It should be judged on all the facts, and respondents have never undertaken fully to state the facts of this case. They

shy far away from the terrible condition of National Bank of Kentucky immediately prior to the organization of Banco. This condition is set forth in our original brief, pages 7 to 27, inclusive, and the correctness or fairness of our statement has never been challenged. In their supplemental brief they seek to avoid the facts as to the condition of the bank by the sly statement on page 17, "the directors of the bank knew that some of the bank's assets had been criticized by the bank examiner although the president of the bank followed the practice of concealing from them the more serious criticisms."

They seek under the title "Banco's Origin and History" to make it appear that Banco had untold millions in cash in addition to assessable bank stock. This is not correct. In the very beginning Banco sold some stock in addition to that exchanged for bank shares. All of it was preempted for the Bank's shareholders. Most of this additional stock was sold to the bank stockholders and paid for with money borrowed from the Banks ($7,000,000, Ex. V 4, p. 1934). A part of it only was subscribed by others. As a result of selling this additional stock, Banco when it started business had in cash and subscriptions approximately ten million dollars, and almost immediately invested substantially all of this new money in other assessable bank stocks pursuant to commitments made before the money was received. Thereafter it had substantially nothing but assessable bank stock.

From the beginning it functioned only as a holding company, transmitting to its stockholders on the same date received the dividends which it received from bank stocks. Banco never had an office or an employee,—it never even had a telephone. See pages 29 to 33, inclusive, of our original brief where the facts are set forth in detail with record references.

The overwhelming proportion of Banco (88.71%) was held by persons who were original bank shareholders and original subscribers who participated in the formation of Banco Kentucky. Those who acquired stock otherwise

(11.29%) by gift, inheritance or purchase on the stock market knew that they were acquiring stock in a bank stockholding company, whose only assets were bank stocks (shown by its statement). None took the stand to deny this obvious fact. They enjoyed the dividends and benefits derived from the bank stocks and must under federal statutes and the decided cases bear their proportion of the statutory burden.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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